IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1270 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

U G DALSANIA

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

1. Special Civil Application No. 1270 of 1998

MR MAULIN R RAVAL for Petitioner No. 1

MR KH BAXI for Petitioner No. 1

MS MAYA DESAI for MR MD PANDYA for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 12/04/2004

ORAL JUDGEMENT

In this petition the petitioner has challenged the order of dismissal from service at annexure-D and

also the orders dismissing his First and Second Appeals at annexures-F and I respectively.

1.1. The petitioner at the relevant time was working as Executive Engineer (O & M) in Gondal Division of the respondent - Board. He was served with the chargesheet wherein alleged acts of misconduct committed by him were narrated. The main allegation against him was that despite clear instructions from the higher quarters, not to examine doubtful meters at the local level, and to send them either to Sabarmati or to Bavla for inspection, he got checked in all 11 meters at Gondal. If was further alleged that one Mr. B.H. Jani had carried out test at Gondal at the instance and upon insistence of the petitioner and had certified them to be in order. inspite of the fact that they were found to be defective and tampered with. It is also the allegation against him that he had asked several of his junior officers to sign the rojkam (proceedings) inspite of the fact that they had not remained present when the checking was done. The said proceedings were to the effect that upon checking the meters they were found to be in order. These meters belonged to certain oil mill companies. Detailed statement of allegations is annexed to this petition at annexure-B. They can be in short stated as under :-

"9. Tampering with official documents, breach of trust or dishonesty in connection with the affairs or property of the Board.

10. Instances of disloyalty to the Board or the superiors under whom the employee is working.

30. Habitual negligence or neglect of work or habitual breach of regulations or instructions."

1.2. It appears from the record of the petition that upon receiving certain information, raid was carried out by the Vigilance Inspector of the respondent - Board and during the surprise checking, all the aforesaid meters were found to be doubtful and having been tampered with by the consumers. It also appears that in respect of some of these, preliminary enquiry was carried out and statements of various persons were recorded in the month of January, 1996. Most of the statements were recorded on 4th January, 1996. The say of the petitioner is that these statements have been recorded by one Mr. P.P. Ajmera who later on was appointed as the Enquiry Officer in the departmental proceedings that were initiated

against him. According to the petitioner he was deliberately made a scapegoat to shield the sins of others. In the enquiry, he was not given effective hearing; important documents were not given to him and was deprived of a chance to cross-examine most important witness.

2. The say of the respondent - Board is that the petitioner was found to have committed aforesaid acts after preliminary enquiry and hence it was decided to proceed against him departmentally. Enquiry was set up. In the course of proceedings he was supplied with all the necessary material alongwith the statement of allegations to enable him to effectively defend his interest at the hearing. The actual hearing of the proceedings commenced on 22nd March, 1996. At the hearing several witnesses were examined on behalf of the respondent - Board. One of them was Mr. B. H. Jani - Deputy Engineer. It appears that in the preliminary enquiry, his statement was not recorded on 4th January, 1996 when the statements of other officers were recorded. However, he had given an explanation to the effect that since he had fallen sick, he was not available for giving statement. It also appears that copies which were furnished to the petitioner alongwith the chargesheet were not very legible and, therefore, vide letter dated 4th April, 1996, he had requested for supply of not only legible copies but certain documents which were not made available to him though they were being used against him in the enquiry. They are as under :-

(i) Checking sheets to be filled in of all the meters;

(ii) legible copies of the proceedings;

(iii) instructions given in writing in the form of circular with regard to opening of meters;

(iv) legible copies of rojkam etc.

2.1. At the time of hearing on behalf of the respondent - Board, Mr. B.H. Jani Deputy Engineer was examined on 4th April, 1996. On that day detailed examination-in-chief was recorded. However, so far as the petitioner is concerned, he had expressed his desired to cross examine the witnesses only after receipt of the aforesaid documents. He had made it very clear that without such documents, he would not be in a position to cross examine Mr. Jani. It also appears from the

endorsement recorded below the evidence of Mr. Jani that the Board gave assurance to furnish legible copies of these documents to the petitioner. The petitioner's further grievance is that Mr. Jani was examined on behalf of the Board and he had made serious allegations in his evidence against the petitioner. His statement which is supposed to have been recorded on 9th January, 1996 was not supplied to him. The petitioner, therefore, demanded copy of the said statement from the Board. On that day, further examination of the witnesses namely Mr.B. H. Jani was deferred to later date. It is an admitted fact that thereafter he never appeared before the Enquiry Officer and gave evidence. Even the Enquiry Officer has made observation in the report that despite having called him twice for cross-examination of the petitioner, he had not turned up. Thus, the fact remains that his evidence was not permitted to be challenged by the petitioner by cross-examining him. In other words, the petitioner was deprived of the valuable right of cross examining the most important witness of the enquiry.

2.2. On conclusion of the enquiry, the Enquiry Officer found him guilty of committing acts of misconduct alleged against him. The petitioner was served with showcause notice indicating imposition of proposed punishment, dated 20th August, 1996. It was replied to by the petitioner. The disciplinary authority concurred with findings of Investigating Officer and he did not agree with the reply of the petitioner. The disciplinary authority i.e. Member (Technical) by order dated 30th October, 1996, passed the order of dismissal against the petitioner.

2.3. Against the said order, the petitioner preferred appeal before the Chairman of the respondent - Board. The said appeal was dismissed and the order of dismissal passed against the petitioner dated 30th October, 1996, was confirmed and dismissal of the appeal was intimated to the petitioner by forwarding letter dated 8th May, 1997 under the signature of the Secretary to the Chairman.

2.4. Against the said order, the petitioner preferred Second Appeal and the appeal memo was forwarded to the respondent - Board vide letter dated 12th June, 1997 addressed to the Secretary of the respondent - Board. The said appeal was also dismissed by the Board and the decision thereof, was conveyed to the petitioner by the Secretary vide letter dated 13th November, 1997. It is these orders which are now being challenged in this

petition.

3. Mr. Maulin Raval learned advocate appearing for the petitioner and Ms. Maya Desai learned advocate appearing for the respondents have advanced various submissions. The first submission of Mr. Raval is that in the aforesaid circumstances, the petitioner was not afforded any opportunity to defend his case effectively. He has submitted that when specific allegation was made against him in the enquiry that Mr. Jani had acted against the interest of the Board only because he was compelled to do so by the petitioner, it was necessary for the Enquiry Officer to give him adequate chance to cross-examine the said witness. He has also submitted that in the instant case, preliminary enquiry was carried out by Mr. P.P. Ajmera, Superintending Engineer, (O & M), who was later on appointed as Enquiry Officer. Such course cannot be permitted as it would cause prejudice to the petitioner. He has also made grievance regarding non-supply of documents to the petitioner.

3.1. As against that Ms. Maya Desai has contended that assuming that the petitioner was denied the opportunity of cross-examining Mr. Jani, it would not cause any prejudice to petitioner because there was other reliable evidence on record to adjudge the petitioner guilty of committing acts of misconduct alleged against him. She has further submitted that statements and evidence of various officers such as Mr. K.B. Shah, Mr. Chudasama etc., are on record to substantiate the allegations that have been made against the petitioner. According to her, no prejudice is likely to be caused to the petitioner. She has, therefore, submitted that the petition has no merit and it deserved to be dismissed. Apart from procedural aspect of the enquiry, both the learned advocates have tried to make submissions on factual aspects of the case but I have prevented them from doing so since I do wish to enter into the questions of facts.

3.2. Mr. Raval has placed reliance on several decisions of the Apex Court, which will be referred to in the due course of the judgment.

4. On going through the record of this petition, there is no dispute that the petitioner, who was facing charge to the effect that he had with ulterior motive got the offending meters examined at Gondal itself instead of following the written instructions to send them either to Sabarmati or to Bavla laboratory. He was, therefore, served with detailed chargesheet where all these

allegations have been duly set out. It is also clear that at the time of actual hearing of the proceedings, the petitioner was given chance to cross-examine the witnesses on behalf of the Board. However, there is material to show that the petitioner had made demand for supply of certain documents which according to him, were very essential for cross examining various witnesses and in particular Mr. B.H. Jani. As stated above, Mr. Jani's evidence was recorded on 4th April, 1996. On that day, after his detailed examination-in-chief, the petitioner was asked to cross-examine him. However, the petitioner expressed his inability to do so in view of the fact that documents which were requested for by him were not supplied to him. It is the case of the Board that when opportunity was given, the petitioner had not cross-examined the witnesses, he, therefore, cannot find fault of Board on the ground that his right to cross-examine the said witnesses was taken away. However, the fact remains that even the respondent had agreed to cross-examination, being postponed to later date and in the meanwhile, to furnish all the necessary documents to the petitioner. It also appears that though this witness i.e. Mr. Jani is the star witness of the respondent Board. Copy of his statement which was recorded earlier during preliminary enquiry i.e. on 9th January, 1996, was never furnished to the petitioner. He had been demanding the same all throughout. Thus, the petitioner was taken by surprise on 4th April, 1996 itself when Board examined Mr. B. H. Jani. Considering the nature of allegations levelled against the petitioner, Mr. Jani is very important witness. When Board had decided to examine him, it was incumbent upon the Board to furnish copy of Mr. Jani's statement in advance to the petitioner. When request to permit cross-examination of such an important witness by the petitioner, only after receipt of certain documents, was made to Enquiry Officer, he was completely justified and it was absolutely necessary for the Board to comply with the said request and to furnish him copies so as to enable him to effectively defend his case. This will be more so when the respondent - Board had assured the petitioner that the documents would be given to him and on that count cross-examination was deferred to a later date. Admittedly, the presence of this witness could only be secured by the respondent for cross-examination by the petitioner. It is stated by Mr. Maulin Raval that between the contents of statement dated 9th January, 1996 and the evidence that was recorded before the Enquiry Officer in the month of April, there is substantial variance and his cross-examination on that aspect would have rendered his evidence unreliable. Be

that as it may, the fact remains that on that day, when the petitioner requested for further examination of that witness, it was postponed to a later date. It was the duty of the respondent to secure his presence for cross-examining him by the petitioner. The respondent could not have raised hands in helplessness saying that after his transfer to Palanpur, his presence could not be secured. The report of the Enquiry Officer, does indicate that Mr. Jani was twice summoned from the Palanpur to appear before it, but he had defied the summons and not appeared before the Enquiry Officer. Thereafter, his evidence before the Enquiry Officer was declared closed. Thus, such an important witness could not be cross-examined by the petitioner because of the fact that on first occasion, the respondent had not made necessary documents available to the petitioner and secondly that despite having issued summons twice, Mr. Jani had not remained present. Surprisingly enough for defying the summons of the Enquiry Officer, Board does not seem to have taken any action against Mr. Jani.

5.1. It also appears that the petitioner's grievance regarding non-supply of statements of Mr. B.H. Jani dated 9th January, 1996, was well founded. Record shows that it was never made available to the petitioner prior to examination of Mr. Jani. In other words, the petitioner never knew what was in the store for him, when Mr. Jani was examined by the Enquiry Officer. Normally, principles of natural justice require that whatever the material that is sought to be relied on by the department in a departmental proceedings, against the delinquent, copies thereof, should be made available to the delinquent. If he is not supplied with the copies thereof, it would amount to violation of those principles. Admittedly, statement of Mr. Jani was not given to the petitioner together with all the aforesaid documents in the present case. It is quite obvious that he had not been given adequate opportunity to defend his case at the hearing and to effectively cross-examine the said Mr. B.H. Jani. To that extent there is violation of principles of natural justice. As stated above the entire case of the department revolved round Mr. Jani. The department seems to have very cleverly played the game of hide and seek with petitioner in the matter of cross-examination of Mr. Jani.

5.2. Mr. Raval has placed reliance on certain decisions right from the year 1960 of the Apex Court. All these decisions are on the question of compliance of principles of natural justice. Before I discuss those decisions, it may be noted here, that Ms. Desai has

tried to point out to this Court that no prejudice has been caused to the petitioner even if it was admitted that the statement of Mr. Jani was not given to him and that he was not cross-examined by the petitioner. According to her, there was otherwise also, ample evidence on record to establish the misconduct. Whatever she has submitted in support of this contention is totally based on facts emerging from the evidence of different witnesses. As already stated above, I have no desire to appreciate the evidence on record. However, from evidence of the witnesses that were read before me by Ms. Desai, it clearly reveals that these witnesses do not have any personal knowledge about what transpired between Mr. Jani and the petitioner. Further, they were never present when Mr. Jani is supposed to have examined the offending meters. It also appeared that their evidence was not consistent on the issue regarding there being written instructions in the form of a Circular not to examine or check the tampered meters at the local level, but they should be sent either to Sabarmati laboratory or to Bavla laboratory. In this state of evidence, Mr. Jani appears to be the main witness of the enquiry. His evidence in the form of examination-in-chief, has been read out by both the learned advocates. It appears that in every line of his evidence, allegations have been made against the petitioner. His evidence is the foundation of the entire building of the enquiry. Thus, if such an important witness is not permitted to be cross-examined by the petitioner for no fault of his, there is no doubt in my mind, that serious prejudice has been caused to him. When I say "not permitted", it would mean that the department created such situation whereby the petitioner could not cross-examine Mr. Jani. The department has thereby virtually deprived the petitioner of his valuable right to defend his interest and prove his innocence. It is stated at the bar that report of the Investigating Officer is extensively based on the evidence of Mr. Jani to hold the petitioner guilty of committing acts of misconduct alleged against him.

5.3. If that is the position, then naturally, the decisions of the Apex Court will apply with all force on the facts of this case.

5.4. In the decision rendered by the Apex Court in the case of State of Punjab v. Bhagat Ram reported in (1975) 1 S.C.C. 155, it has been held :-

"7. The meaning of a reasonable opportunity of showing cause against the action proposed to be

taken is that the Government servant is afforded a reasonable opportunity to defend himself against charges on which enquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have an effective and useful cross-examination.

8. It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the enquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken."

Again in the decision rendered in the case of Chandrama Tiwari v. Union of India reported in 1988 (56) S.C. F.L.R. at page 323, it has been held as under :-

"It is now well settled that if copies of relevant and material documents including the statement of witnesses recorded in the preliminary enquiry or during investigation are not supplied to the delinquent officer facing the enquiry and if such documents are relied in holding the charges framed against the officer, the enquiry would be vitiated for the violation of principles of natural justice. Similarly, if the statement of the witnesses recorded during the investigation of a criminal case or in the preliminary enquiry is not supplied to the delinquent officer that would amount to denial of opportunity of effective cross-examination. It is difficult to comprehend exhaustively the facts and circumstances which may lead to violation of principles of natural justice or denial of reasonable opportunity of defence. This question must be determined on the facts and circumstances of each case. While considering the question it has to be borne in mind that a delinquent officer

> is entitled to have copies of material and relevant documents only which may include the copy of statement of witnesses recorded during the investigation or preliminary enquiry or the copy of any other document which may have been relied in support of the charges. If a document has no bearing on the charges or if it is not relied by the enquiry officer to support the charges, or if such document or material was not necessary for the cross-examination of witnesses during the enquiry, the officer cannot insist upon the supply of copies of such documents, as the absence of copy of such document will not prejudice the delinquent office. The decision of the question whether a document is material or not will depend upon the facts and circumstances of each case."

6. In the instant case, as stated above, so far as the petitioner is concerned, the evidence of Mr. Jani was very important and relevant, since he was the main person figuring in the accusations that had been made against the petitioner. This witness was examined by the department against the petitioner to prove these accusations. He was, therefore, required to be cross-examined thoroughly, but the said opportunity has been denied to the petitioner, nor his previous statement has been supplied to him. It is pertinent to note that the material which is not made available to the petitioner is heavily relied on by the department against him. This decision therefore, will squarely apply to the facts of this case.

7. So far the contention with regard to petitioner not being permitted to avail the service of Mr. Golandaz is concerned, Mr. Raval has placed reliance on the decision of the Apex Court rendered in the case of Bhagat Ram v. State of Himachal Pradesh reported in A.I.R. 1983 S.C. 454. In the said case the Apex Court has even gone to the extent that when the disciplinary authority was represented by the presenting officer and Co-delinquent was represented by the officer of his choice, but delinquent of Class-IV employee ought to have been asked as to whether he wanted also to be represented by Government servant. When it was not so asked, proceedings were held to be vitiated. Since the aforesaid authorities adequately deal with the aspect highlighted by Mr. Raval, other authorities on the same point are not required to be discussed here.

7.1. The next submission of Mr. Raval in the instant

case is that preliminary enquiry in the month of January, 1996 was conducted by Superintending Engineer Mr. P. P. Ajmera and the same officer was later on appointed as Enquiry Officer. Ms. Desai has challenged this contention on the ground that no preliminary enquiry was held by Mr. Ajmera. However, there appears to be some substance in the submission of Mr. Raval. In the order of the Chairman delivered in appeal preferred against the order of dismissal by the petitioner, he has observed as under :-

"The first contention of Shri Dalsania is that Shri Ajmera had earlier made a preliminary enquiry in the matter and hence, Shri Ajmera should not have been appointed as Enquiry Officer. In my opinion, there is no merit in this contention. Officer making preliminary enquiry can be legally appointed as Enquiry Officer to conduct the regular departmental enquiry against the person proceeded against."

Moreover, there is other material to show that it was Mr. Ajmera who had recorded the previous statements, conducted preliminary enquiry.

Thus, upon receiving complaints in relation to power theft, tampering of meters, filling up Proforma by Junior Engineers and resealing of meters done at the instance of the petitioner etc., from S.E. (Vigilance), preliminary enquiry was conducted by Mr. Ajmera and he recorded statements of various persons. He had acted in the capacity of a Investigating Officer. It was, therefore, not desirable to appoint him to act in the capacity of a Judge. Unwittingly, also be may try to see that his investigation had ultimately resulted into establishing the guilt of the delinquent.

7.2. If that be so, then naturally, the petitioner is bound to feel that no justice has been made to him. It is often said that justice should not only be done but it should appear to have been done. In the instant case, unfortunately, it is the other way round, if the enquiry officer and the person who conducted the preliminary enquiry are the same, there is grave prejudice that is likely to be caused to the delinquent.

8. Before parting with the judgment it is worthwhile to deal with one technical submission advanced by Ms. Desai. According to her the petitioner had filed several Civil suits in relation to the subject matter of this petition and that important fact has been deliberately

suppressed by the petitioner. On that reason alone petition deserved to the dismissed, She has submitted. Ofcourse, she has also advance submission regarding availability of equally efficacious alternative remedy to the petitioner.

8.1. This submission cannot be accepted firstly because in the petition, orders of dismissal from service as well as of first and second appeals are challenged which are not the subject matter of any existing suit. Secondly because this petition was admitted to final hearing by this Court [Coram : K.R. Vyas, J.] vide order dated 23rd February, 1998, and the hearing was ordered to be expedited. On 15th March, 2000 this Court [Coram : Ravi R. Tripathi, J.] passed order fixing it for final hearing on 4th April, 2000. On 18th April, 2000, request was made by respondent - Board for time to file affidavit-in-reply. This Court very reluctantly, as a last chance, adjourned the hearing to 2nd May, 2000 by observing that the Rule was expedited on 23rd February, 1998 and thereafter hearing was fixed on 4th April, 2000, the Board had not filed the affidavit. Matter was ordered to be notified on separate Board.

8.2. If the respondent - Board was really feeling concern about the aspects regarding availability of alternative remedy and suppression of facts, it could have filed the reply at the earliest and could have brought these facts to the notice of the Court to get the matter decided on those grounds. However, that was not done. It is over six years after the admission of matter this submission is made. After lapse of such a long period, the matter is required to be decided on its merits only and it cannot be disposed of on such technicalities. By relegating the petitioner to remedy of Civil suit at this stage would virtually amount to rendering the petitioner remediless. Further so far aspect of suppression of facts is concerned, may be that fact regarding pendency of Civil suits is not stated in the petition, but when suits are not in relation to orders of dismissal from service and other consequential orders, it would not amount to suppression of material fact and petition cannot be dismissed on that ground.

In view of the aforesaid, impugned order of the Member (Technical) dated 30th October, 1996, is based on the material which was adduced by not observing proper principles of natural justice. As stated above, the petitioner would be entitled to have relief in his favour, on this short ground alone. The impugned order at annexure-D is, therefore, quashed and set aside.

Further the orders passed in first and Second Appeal at annexures-F and I respectively are also quashed and set aside. The respondent is directed to reinstate the petitioner on his original post together with all the incidental benefits. The respondent if so desire, can initiate a fresh enquiry from the stage where it has been found defective. Rule is made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

13th April, 2004.

At this juncture, before the judgment is signed, Ms. Maya Desai learned advocate for the respondents has made a request that this judgment be stayed for a period of four weeks. However, considering the facts and circumstances of the case, this judgment is stayed for a period of three weeks from today.

[AKSHAY H. MEHTA, J.]

/phalguni/